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## **\*\*\*I** **REPORT**

on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector  
(COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Marco Cappato

Draftsman (\*) : Ilka Schröder, Committee on Industry, External Trade,  
Research and Energy

(\*) Hughes Procedure

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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(\*) Hughes Procedure

## PROCEDURAL PAGE

By letter of 25 August 2000 the Commission submitted to Parliament, pursuant to Article 251(2) and Article 95 of the EC Treaty, the proposal for a European Parliament and Council directive on concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 - 2000/0189 (COD)).

At the sitting of 8 September 2000 the President of Parliament announced that she had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Budgets, the Committee on Legal Affairs and the Internal Market and the Committee on Industry, External Trade, Research and Energy and Committee on the Environment, Public Health and Consumer Policy for their opinions (C5-0439//2000).

At the sitting of 6 October 2000 the President of Parliament announced that the Committee on Industry, External Trade, Research and Energy, which had been asked for its opinion, would be involved in drawing up the report, under the Hughes Procedure.

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Marco Cappato rapporteur at its meeting of 29 August 2000.

It considered the Commission proposal and draft report at its meetings of 4 December 2000 and 19 June and 11 July 2001.

At the last meeting it adopted the draft legislative resolution by 22 votes to 12, with 5 abstentions.

The following were present for the vote: Graham R. Watson, chairman; Robert J.E. Evans and Enrico Ferri, vice-chairmen; Marco Cappato, rapporteur; Michael Cashman, Charlotte Cederschiöld, Carmen Cerdeira Morterero (for Gerhard Schmid), Ozan Ceyhun, Thierry Cornillet, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Adeline Hazan, Jorge Salvador Hernández Mollar, Anna Karamanou, Sylvia-Yvonne Kaufmann (for Pernille Frahm), Margot Keßler, Timothy Kirkhope, Eva Klamt, Alain Krivine (for Fodé Sylla), Klaus-Heiner Lehne (for Mary Elizabeth Banotti), Luís Marinho (for Sérgio Sousa Pinto), Iñigo Méndez de Vigo (for Daniel J. Hannan), Hartmut Nassauer, Arie M. Oostlander (for Carlos Coelho), Elena Ornella Paciotti, Paolo Pastorelli, Hubert Pirker, Martine Roure (for Martin Schulz), Amalia Sartori (for Marcello Dell'Utri), Ingo Schmitt (for Bernd Posselt), Ilka Schröder (for Alima Boumediene-Thiery), Patsy Sørensen, Joke Swiebel, Anna Terrón i Cusí, Astrid Thors (for Baroness Sarah Ludford), Maurizio Turco (for Frank Vanhecke), Gianni Vattimo, Christian Ulrik von Boetticher and Jan-Kees Wiebenga.

The opinions of the Committee on Legal Affairs and the Internal Market, the Committee on Industry, External Trade, Research and Energy and the Committee on the Environment, Public Health and Consumer Policy are attached; the Committee on Budgets decided on 14 September 2000 not to deliver an opinion.

The report was tabled on 13 July 2000.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

## LEGISLATIVE PROPOSAL

### Proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))

The proposal is amended as follows:

Text proposed by the Commission <sup>1</sup>

Amendments by Parliament

Amendment 1  
Citation 4a (new)

*having regard to Articles 7 and 8 of the European Union Charter of Fundamental Rights, proclaimed in Nice on 7 December 2000, which seek to guarantee respect for private life and communications, including personal data,*

*Justification*

*The above reference is necessary owing to the fact that data protection is explicitly provided for in the Charter of Fundamental Rights.*

Amendment 2  
Recital 5a (new)

*(5a) Information that is part of a broadcasting service provided over a public communications network is intended for a potentially unlimited audience and does not constitute a communication in the sense of this Directive. However in cases where the individual subscriber or user receiving such information can be identified, for example with video-on-demand services, the information conveyed is covered within the meaning of a communication for the purposes of this Directive.*

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<sup>1</sup> OJ C 365, 19.12.2000, p. 223

*Justification*

*The above amendments clarifies the position of on-demand transmissions.*

Amendment 3  
Recital 8

(8) The Member States, providers and users concerned, together with the competent Community bodies, should cooperate in introducing and developing the relevant technologies where this is necessary to apply the guarantees provided for by this Directive **and taking particular account of the objectives of minimising the processing of personal data and of using anonymous or pseudonymous data where possible.**

(8) The Member States, providers and users concerned, together with the competent Community bodies, should **ensure that the processing of personal data is limited to a minimum and uses anonymous or pseudonymous data wherever possible, and must** cooperate in introducing and developing the relevant technologies where this is necessary to apply the guarantees provided for by this Directive.

*Justification*

*This wording insists on the priority that protection of personal information must enjoy, compared to the rather weak formulation in the Commission's proposal.*

Amendment 4  
Recital 10

(10) Like Directive 95/46/EC, this Directive does not **address** issues of protection of fundamental rights and freedoms related to activities which are not governed by Community law. **It is for Member States to take such measures as are necessary for the protection of public security, defence, State security** (including the economic well-being of the State when the activities relate to State security matters) **and** the enforcement of criminal law. **This Directive does not affect the ability of Member States to carry out** lawful interception of electronic

(10) Like Directive 95/46/EC, this Directive **addresses** issues of protection of fundamental rights and freedoms, related to activities which are governed by Community law. **In taking measures for the protection of public security, defence, State security** (including the economic well-being of the State when the activities relate to State security matters), the enforcement of criminal law, **and in carrying out** lawful interception of electronic communications if necessary for any of these purposes, **Member States have to act on the basis of a specific law which**

communications if necessary for any of these purposes.

*is comprehensible to the general public, and the measures have to be entirely exceptional, authorised by the judicial or competent authorities for individual cases and for a limited duration, appropriate, proportionate and necessary within a democratic society. Under the European Convention on Human Rights and pursuant to rulings issued by the Court of Human Rights, any form of wide-scale general or exploratory electronic surveillance is prohibited.*

#### *Justification*

*This wording highlights the need to show respect for fundamental rights in the field of data protection, in accordance with European case-law.*

#### Amendment 5

##### Recital 13

(13) Service providers should take appropriate measures to safeguard the security of their services, if necessary in conjunction with the provider of the network, and inform subscribers of any special risks of a breach of the security of the network. Such risks may especially occur for electronic communications services over an open network such as the Internet. It is particularly important for subscribers and users of such services to be fully informed by their service provider of the existing security risks which are outside the scope of possible remedies by the service provider. Service providers who offer publicly available electronic communications services over the Internet should inform users and subscribers of measures they can take to protect the security of their communications for instance by using specific types of software or encryption technologies. Security is appraised in the light of Article 17 of Directive 95/46/EC.

(13) Service providers should take appropriate measures to safeguard the security of their services, if necessary in conjunction with the provider of the network, and inform subscribers of any special risks of a breach of the security of the network. Such risks may especially occur for electronic communications services over an open network such as the Internet or *mobile telephony*. It is particularly important for subscribers and users of such services to be fully informed by their service provider of the existing security risks which are outside the scope of possible remedies by the service provider. ***Service providers shall be obliged to notify subscribers about the type of traffic data being processed and their right to refuse such processing.*** Service providers who offer publicly available electronic communications services over the Internet should inform users and subscribers of measures they can take to protect the security of their



communications for instance by using specific types of software or encryption technologies. Security is appraised in the light of Article 17 of Directive 95/46/EC. ***The requirement to inform subscribers of particular security risks does not discharge a service provider from the obligation to take, at his own costs, appropriate and immediate measures to remedy any new, unforeseen security risks and restore the normal security level of the service. The provision of information about security risks to the subscriber should be free of charge except for any nominal costs which the subscriber may incur while receiving or collecting the information, for instance by downloading an electronic mail message.***

*Justification*

*It is deemed indispensable to include a reference to the medium of mobile telephony and to users' rights in the proposal for a directive.*

Amendment 6  
Recital 14

(14) Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications services. ***National legislation in some Member States only prohibits intentional unauthorised access to communications.***

(14) Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications services. ***These measures should include the facilitation of proven cryptography and anonymisation or pseudonymisation tools.***

*Justification*

*Effective protection cannot rely on legal measures only, whatever their scope. The general availability of adequate tools must be ensured.*

Amendment 7  
Recital 15

(15) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons who have a right to respect for their correspondence. The legitimate interests of legal persons should also be protected. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform for the marketing of *its own* electronic communications services or for the provision of value added services, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his consent to such processing. Traffic data used for marketing of *own* communications services or for the provision of value added services should also be erased or made anonymous after the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.

(15) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons who have a right to respect for their correspondence. The legitimate interests of legal persons should also be protected. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform for the marketing of electronic communications services or for the provision of value added services, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his consent to such processing. Traffic data used for marketing of communications services or for the provision of value added services should also be erased or made anonymous after the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.

*Value added services may for instance consist of advice on least expensive tariff packages, route guidance, traffic information, weather forecasts and tourist information.*

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 8  
Recital 15a (new)

***(15a) For the purposes of this Directive consent of a user or subscriber, regardless of whether the latter is a natural or a legal person, should have the same meaning as the data subject's consent as defined and otherwise determined within Directive 95/46/EC.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 9  
Recital 15b (new)

***(15b) The prohibition of storage of communications and the related traffic data by others than the users or without their consent is not intended to prohibit any automatic, intermediate and transient storage of this information in so far as this takes place for the sole purpose of carrying out the transmission in the electronic communications network and provided that the information is not stored for any period longer than is necessary for the transmission and for traffic management purposes, and that during the period of storage the confidentiality remains guaranteed. Where this is necessary for making more efficient the onward transmission of any publicly***

***accessible information to other recipients of the service upon their request, this Directive should not prevent that such information may be further stored, provided that this information would in any case be accessible to the public without restriction and that any data referring to the individual subscribers or users requesting such information are erased.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 10  
Recital 15c (new)

***(15c) Confidentiality of communications should also be ensured in the course of lawful business practice. Where necessary and legally authorised, communications can be recorded for the purpose of providing evidence of a commercial transaction. Directive 95/46/EC applies to such processing. Parties to the communications should to be informed prior to the recording about the recording, its purpose and the duration of its storage. The recorded communication should be erased as soon as possible and in any case at the latest by the end of the period during which the transaction can be lawfully challenged.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

## Amendment 11

### Recital 16

(16) The introduction of itemised bills has improved the possibilities for the subscriber to check the accuracy of the fees charged by the service provider but, at the same time, it may jeopardise the privacy of the users of publicly available electronic communications services. Therefore, in order to preserve the privacy of the user, Member States should encourage the development of electronic communication service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available electronic communications services, for example calling cards and facilities for payment by credit card.

(16) The introduction of itemised bills has improved the possibilities for the subscriber to check the accuracy of the fees charged by the service provider but, at the same time, it may jeopardise the privacy of the users of publicly available electronic communications services. Therefore, in order to preserve the privacy of the user, Member States should encourage the development of electronic communication service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available electronic communications services, for example calling cards and facilities for payment by credit card. ***Alternatively, Member States may require the deletion of a certain number of digits from the called numbers mentioned in itemised bills.***

### *Justification*

*This recital reinserts part of Recital 18 of Directive 97/66/EC on the deletion of digits.*

## Amendment 12

### Recital 17a (new)

***(17a.) Whether the consent to be obtained for the processing of personal data in view of providing a particular value added service must be that of the user or of the subscriber, will depend on the data to be processed and on the type of service to be provided and on whether it is technically, procedurally and contractually possible to distinguish the individual using an electronic communications service from the legal or natural person having subscribed to it.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 13  
Recital 18, last sentence

The privacy options which are offered on a per-line basis do not necessarily have to be available as an automatic network service but may be obtainable through a simple request to the provider of the publicly available electronic communications service.

The privacy options which are offered on a per-line basis do not necessarily have to be available as an automatic network service but may be obtainable ***free of charge*** through a simple ***and standardised*** request to the provider of the publicly available electronic communications service.

*Justification*

*These privacy options are an essential right and not a "value added service". The need to be able to use them on all kinds of networks or origination points (public payphones, third-party lines, etc.) means that it must be possible for them to be activated with identical codes on all networks.*

Amendment 14  
Recital 18a (new)

***(18a) Where the provider of an electronic communications service or of a value added service subcontracts the processing of personal data necessary for the provision of these services to another entity, this subcontracting and subsequent data processing must be in full compliance with the requirements regarding controllers and processors of personal data as set out in Directive 95/46/EC.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 15  
Recital 18b (new)

***(18b) Where the provision of a value added service requires that traffic or location data are forwarded from an electronic communications service provider to a provider of value added services, the subscribers or users to whom the data are related should also be fully informed of this forwarding before giving their consent for the processing of the data.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 16  
Recital 20

(20) Directories of subscribers to electronic communications services are widely distributed and publicly available. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers ***are able to*** determine ***whether*** their personal data are published in a directory ***and, if so, which. Providers of public directories should inform the subscribers included in such directories of the purposes of the directory and of any particular usage which may be made of electronic versions of public directories especially through search functions embedded in the software, such as reverse***

(20) Directories of subscribers to electronic communications services are widely distributed and publicly available. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers ***shall be entitled, free of charge, to be omitted at his or her request or determine the extent to which*** their personal data are published in a directory.

*search functions enabling users of the directory to discover the name and address of the subscriber on the basis of a telephone number only.*

*Justification*

*Conformity with the proposed amendment to Article 12.*

Amendment 17  
Recital 20a (new)

***(20a) The obligation to inform subscribers of the purpose(s) of public directories in which their personal data are to be included should be imposed on the party collecting the data for such inclusion. Where the data may be transmitted to one or more third parties, the subscriber should be informed of this possibility and of the recipient or the categories of possible recipients. Any transmission should be subject to the condition that the data may not be used for other purposes than those for which they were collected. If the party collecting the data from the subscriber or any third party to whom the data have been transmitted wishes to use the data for an additional purpose, the renewed consent of the subscriber must be obtained either by the initial party collecting the data or by the third party to whom the data have been transmitted***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*



Amendment 18  
Recital 21

(21) Safeguards should be provided for subscribers against intrusion of their privacy by means of unsolicited calls, telefaxes, electronic mails and other forms of communications for direct marketing purposes. Member States may limit such safeguards to subscribers who are natural persons.

(21) Safeguards should be provided for subscribers against intrusion of their privacy by means of unsolicited calls, telefaxes, electronic mails and other forms of communications for direct marketing purposes. Member States may limit such safeguards to subscribers who are natural persons. ***The proposal to include unsolicited commercial electronic communications in the scope of Article 13.1 is essential in order to deal with the specificities of electronic messaging. The costs and “nuisance factor” involved in unsolicited commercial electronic messages, particularly on mobile devices, is substantially greater than offline postal mail. The proposal of a ban on unsolicited commercial electronic communications should not, therefore, infer any alteration to provisions of Community law relating to offline commercial communications.***

*Justification*

*The specificities of e-mail and the nuisance caused by having to deal with unsolicited e-mails mean that greater attention must be paid to protecting privacy in connection with such communications.*

Amendment 19  
Recital 21a (new)

***(21a) Member States' possibilities for taking legal action on their own in respect of unsolicited electronic communications are limited and imply international cooperation. It also makes a big difference whether the sender has used a static or a dynamic address. A system which prohibits the sending of messages without the recipients' consent (opt-in) is not effective on its own. The sector concerned should be encouraged to draw up common rules, if***

***necessary having the same status as that provided for in Article 27 of Directive 95/46.***

*Justification*

*The main aim of the fight against unsolicited communications is that service providers should develop filter programs. Unfortunately, there are many examples showing that recipients in countries with opt-in systems receive large quantities of spam in spite of the rules. It is therefore more important, with regard to individual members of the public and consumers, that service providers have a strong interest in improving their service. If need be, models and good practice guidelines could be drawn up within the remit of the Article 29 Working Party.*

Amendment 20  
Recital 21b (new)

***(21b) Spamming – the bulk sending of untargeted unsolicited e-mails – is already covered by special protection measures, in particular by Article 7(1) of Directive 2000/31/EC, by Articles 6 and 7 of the general data protection Directive 95/46/EC, by Directive 84/450/EEC on misleading advertising and by Directive 93/13/EC on unfair terms in consumer contracts.***

*Justification*

*Existing, current legislation can be used to combat spamming and, therefore, there is no need for a new, rigid and cost-increasing legislation that most likely will not have any effect on spamming*

Amendment 21  
Recital 22

(22) The functionalities for the provision of electronic communications services may be integrated in the network or in any part of the terminal equipment of the user, including the software. The protection of the personal data and the privacy of users

(22) The functionalities for the provision of electronic communications services may be integrated in the network or in any part of the terminal equipment of the user, including the software. The protection of the personal data and the privacy of users

of publicly available electronic communications services should be independent of the configuration of the various components necessary to provide the service and of the distribution of the necessary functionalities between these components. Directive 95/46/EC covers any form of processing of personal data regardless of the technology used. The existence of specific rules for electronic communications services alongside general rules for other components necessary for the provision of such services may not facilitate the protection of personal data and privacy in a technology neutral way. It may therefore be necessary to adopt measures requiring manufacturers of certain types of equipment used for electronic communications services to construct their product in such a way as to incorporate safeguards to ensure that the personal data and privacy of the user and subscriber are *protected*. The adoption of such measures in accordance with Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity will ensure that the introduction of technical features of electronic communication equipment including software for data protection purposes is harmonised in order to be compatible with the implementation of the internal market.

of publicly available electronic communications services should be independent of the configuration of the various components necessary to provide the service and of the distribution of the necessary functionalities between these components. Directive 95/46/EC covers any form of processing of personal data regardless of the technology used. The existence of specific rules for electronic communications services alongside general rules for other components necessary for the provision of such services may not facilitate the protection of personal data and privacy in a technology neutral way. It may therefore be necessary to adopt measures requiring manufacturers of certain types of equipment used for electronic communications services to construct their product in such a way as to incorporate safeguards to ensure that the personal data and privacy of the user and subscriber are *not infringed*. The adoption of such measures in accordance with **Directives 95/46/EC and** 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity will ensure that the introduction of technical features of electronic communication equipment including software for data protection purposes is harmonised in order to be compatible with the implementation of the internal market.

#### *Justification*

*Conformity with the proposed amendment to Article 14.*

Amendment 22  
Article 1, paragraph 3

3. This Directive shall not apply to activities which fall outside the scope of the EC Treaty, ***such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.***

3. This Directive shall not apply to activities which fall outside the scope of the EC Treaty.

*Justification*

*Giving examples of activities which fall outside the scope of the EC Treaty is redundant, and inflexible with a view to any future changes to the Treaty.*

Amendment 23  
Article 2(b)

(b) ‘traffic data’ means any data processed ***in the course of or*** for the purpose of the ***transmission*** of a communication ***over*** an electronic communications network;

(b) ‘traffic data’ means any ***personal*** data processed for the purpose of the ***conveyance*** of a communication ***on*** an electronic communications network ***or for the billing thereof;***

*Justification*

*Compromise between the Council orientation and the Cappato report former amendment on the article.*

Amendment 24  
Article 2(d)

(d) ‘communication’ means any ***information exchanged or transmitted*** between a finite number of parties by means of a publicly available electronic

(d) ‘communication’ means any ***exchange or conveyance of information*** between a finite number of parties by means of a publicly available electronic

communications service;

communications service.

***This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information.***

*Justification*

*Compromise between the Council orientation and Cappato report amendment on the article.*

Amendment 25

Article 2(f) and (g) (new)

***(f) "value added service" means any service which requires the processing of traffic data or location data other than traffic data beyond what is necessary for the transmission of a communication or the billing thereof.***

***(g) "electronic mail" means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 26

Article 4, paragraph 2

2. In case of a particular risk of a breach of the security of the network, the provider of a publicly available electronic communications service must inform the

2. In case of a particular risk of a breach of the security of the network, the provider of a publicly available electronic communications service must inform the

subscribers concerning such risk and any possible remedies, including the costs involved.

subscribers concerning such risk and, **where the risk is outside the scope of the measures to be taken by the service provider**, of any possible remedies, including **an indication** of the **likely** costs involved.

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 27  
Article 5, paragraph 1

1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data, by persons other than users, without the consent of the users concerned, except when legally authorised to do so, in accordance with Article 15(1).

1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data, by persons other than users, without the consent of the users concerned, except when legally authorised to do so, in accordance with Article 15(1). ***This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 28  
Article 5, paragraph 2

2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.

2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data ***when carried out*** in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 29  
Article 5, paragraph 2a (new)

***2a. Member States shall prohibit the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user without the prior, explicit consent of the subscriber or user concerned. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network.***

*Justification*

*Terminal equipment of users of electronic communications networks and any information stored on such equipment are part of the private sphere of the users requiring protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms. So-called cookies, spyware, web bugs, hidden identifiers and other similar devices that enter the users' terminal equipment without their explicit knowledge or explicit consent in order to gain access to information, to store hidden information or to trace the activities of the user may seriously intrude the privacy of these users. The use of such devices should therefore be prohibited unless the explicit, well-informed and freely given consent of the user concerned has been obtained.*

Amendment 30  
Article 6, paragraph 2

2. Traffic data which are necessary for the purposes of **subscriber** billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

2. Traffic data which are necessary for the purposes of billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

*Justification*

*The reference to subscribers should be deleted, as not only end-users, who are subscribers in the contractual context, but also other parties who act as intermediaries, are billed.*

Amendment 31  
Article 6, paragraph 3

3. For the purpose of marketing **its own** electronic communications services or for the provision of value added services **to the subscriber**, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services, if the subscriber has given his consent.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services **or marketing**, if the subscriber **or user to whom the data relate** has given his consent.

*Justification*

*Council orientation (that already includes Cappato report amendment on the paragraph), except the last Council sentence on the possibility to withdraw consent; this right is already guaranteed by Article 14 of Directive 95/46/CE on the data subject's right to object.*



Amendment 32  
Article 6, paragraph 4

4. The service provider must inform the subscriber of the types of traffic data which are processed for the purposes mentioned in paragraphs 2 and 3 and of the duration of such processing.

4. The service provider must inform the subscriber *or user* of the types of traffic data which are processed and of the duration of such processing for the purposes mentioned in paragraph 2 and, ***prior to obtaining consent***, for the purposes in paragraph 3.

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 33  
Article 6, paragraph 5

5. Processing of traffic data, in accordance with paragraphs 1 to 4, must be restricted to persons acting under the authority of providers of the public communications networks and services handling billing or traffic management, customer enquiries, fraud detection, marketing ***the provider's own*** electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

5. Processing of traffic data, in accordance with paragraphs 1 to 4, must be restricted to persons acting under the authority of providers of the public communications networks and services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

*Justification*

*Privacy should be protected irrespective of who owns the services marketed.*

Amendment 34  
Article 6, paragraph 6

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent ***authorities*** to be informed of traffic data in conformity with applicable

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent ***bodies*** to be informed of traffic data in conformity with applicable

legislation with a view to settling disputes, in particular interconnection or billing disputes.

legislation with a view to settling disputes, in particular interconnection or billing disputes

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 35  
Article 9, Title and paragraph 1

Location data

1. Where ***electronic communications networks are capable of processing*** location data other than traffic data, relating to users or subscribers of their services, these data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service.

Location data ***other than traffic data***

1. Where location data other than traffic data, relating to users or subscribers of electronic communications networks or services ***can be processed***, these data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data other than traffic data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. ***Users or subscribers shall be given the possibility to withdraw their consent for the processing of location data other than traffic data at any time.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 36  
Article 12, paragraph 1

**1. Member States shall ensure that subscribers are informed , free of charge, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.**

**1. Personal data contained in printed or electronic directories of subscribers available to the public or obtainable through directory enquiry services should be limited to what is necessary to identify a particular subscriber, unless the subscriber has given his unambiguous consent to the publication of additional personal data. The subscriber shall be entitled, free of charge, to be omitted from a printed or electronic directory at his or her request, to determine which data may be listed, to verify, correct or withdraw such data, to indicate that his or her personal data may not be used for the purpose of direct marketing, to have his or her address omitted in part and not to have a reference revealing his or her sex, where this is applicable linguistically.**

*Justification*

*The current legislation (Directive 97/66) is re-proposed as a satisfactory solution, because everyone is already entitled to have his or her personal data, mobile-phone number or e-mail address taken out of the directories.*

*It is just necessary to specify that any request coming from the user for total or partial omission should be free of charge. For that reason the provision allowing operators to require a payment is deleted.*

Amendment 37  
Article 12, paragraph 2

2. Member States shall ensure that subscribers are given the opportunity , free of charge, to determine whether their personal data are included in public directories, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify,

2. Member States shall ensure that subscribers are given the opportunity, to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or

correct or withdraw such data.

withdraw such data. ***Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 38  
Article 12, paragraph 2a (new)

***2a. Member States shall ensure that subscribers are given the opportunity, to be informed in relation to their personal data included in public directories which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data.***

*Justification*

*The consumer has to be informed of the purpose of a specific Directory (printed or electronic) (Art. 12.1). However, I do not fully share the view that all the options mentioned in paragraph 12(2) must be free of charge, since any service entails costs. It will be up to the market and the parties involved (customers and providers), and not the regulation, to determine the relevant price, if one exists.*

*I propose that the existing “opt-out” regime be kept for directories, under which every subscriber would be included in the directory unless he expresses his wish not to be listed. I believe that the Commission's proposal for an opt-in system would render it practically impossible for directory publishers to fulfil the requirements of the universal service Directive to publish at least one universal directory per EU Member State. Moreover, opt-in is detrimental to the user's need to have access to the relevant information, and it is an unjustified attack on the existence of the directories industry.*

Amendment 39  
Article 12, paragraph 2b (new)

***2b. Member States shall ensure that for any purpose of a public directory other than the search of communication details of persons on the basis of their name and, where necessary, a minimum of other identifiers, the additional consent of the subscribers is required.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

Amendment 40  
Article 12, paragraph 2c (new)

***2c. Personal data contained in the directories should be limited to what is necessary to identify a particular subscriber, as determined by the provider of the directory, unless the subscriber has given his unambiguous consent, in commercial terms, to the publication of additional personal data.***

*Justification*

*The new paragraph 2c seeks to delimit clearly the set of personal data which will be included in the directory to fulfil the requirement of the universal service Directive, while specifying that additional data may be included under commercial terms.*

Amendment 41  
Article 13

***- 1. Personal data treatment for unsolicited communications is regulated by the General Data Protection Directive (95/46/EC).***

### *Justification*

*General directive 95/46/EC already enables it to be established when the processing of personal data for unsolicited communication is lawful, according to "principles relating to data quality". The general directive also establishes a series of criteria for "making data processing legitimate" (e.g. when "unambiguous consent" of the data subject is expressed, but also when public data, freedom of expression or vital interests of the data subject are involved), that it would be wrong (and technologically "non-neutral") to eliminate on technological grounds.*

*Opt-in and opt-out systems are both used in the Member States, and the subsidiarity principle would tend to argue against the imposition of a common practice, which would in any case co-exist with hundreds of national legislations around the world. Opt-out systems are already specified by the e-commerce Directive (2000/31) and the distance-selling Directive (97/7).*

### Amendment 42

#### Article 13, paragraph 1

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) **or electronic mail** for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

1. The use of automated calling systems without human intervention (automatic calling machines) **or** facsimile machines (fax) for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent

### *Justification*

*An opt-in solution for e-mail marketing will penalise responsible marketers, but not stop illegitimate ones from continuing to send unsolicited e-mails. Spamming is already covered by special protection measures including Article 7 (1) of Directive 200/31/EC and Articles 6 and 7 of the general data protection Directive 95/46/EC. Stricter legal requirements will only have the effect of reducing the impetus for business to develop effective software solutions within the EU.*

Amendment 43  
Article 13, paragraph 1a (new)

***1a. In addition, Member States shall take appropriate measures to ensure that other commercial communications by a service provider established in their territory shall be identifiable clearly and unambiguously as such, as soon as they are received by the subscriber.***

*Justification*

*The distance-selling Directive in Article 10 establishes the opt-in system (consumer's prior consent) for faxes or automatic call systems. However, it specifies the opt-out system for other electronic communications (which includes e-mail messages). The proposed directive defends the opt-in system for the sake of supposed increased harmonisation among all European countries. However, it will only harm e-commerce in Europe vis-à-vis other parts of the world.*

*Moreover, Article 7(2) of the e-commerce Directive also establishes that the opt-out system shall apply. This will lead to great uncertainty for ISPs and a serious lack of consistency among different EU pieces of legislation.*

*It is understood that the objective of the European Commission is to combat so-called spamming. However, sending direct marketing via e-mail should be considered as a legitimate business activity since it involves something that is completely different from spamming. The spamming should not be considered as a direct marketing activity, since, in the majority of cases, the spammed consumer cannot identify the origin of his data.*

The opt-out system will promote e-commerce in Europe, one of the major objectives of the eEurope initiative. The opt-in system will be a barrier to the same and will help encourage direct marketing companies to set up their business outside the European Union, where the legislative framework allows the opt-out for direct marketing purposes.

Amendment 44  
Article 13, paragraph 1b (new)

***1b. Member States shall ensure that service providers undertaking unsolicited commercial communications by means others than those in paragraph 1 regularly consult and respect the opt-out registers in which natural persons not wishing to receive such commercial communications.***

*Justification*

*See amendment 43.*

Amendment 45  
Article 13, paragraph 2

2. Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, by means other than those referred to in paragraph **1**, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.

2. Member States shall take appropriate measures to ensure that, free of charge **and in an easy and clear manner**, unsolicited communications for purposes of direct marketing, by means other than those referred to in **previous** paragraphs , are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.

Amendment 46  
Article 13, paragraph 2a (new)

***2a. The practice of sending electronic messages for the purpose of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made shall be prohibited.***

*Justification*

*The explicit reference to the fraudulent practice of disguising the identity of the sender could strengthen anti-spamming efforts, even if not only the general directive, but also other directives already protect the consumer (84/450 on misleading advertising, 93/13 on unfair terms in consumer contracts and 98/6 on the indication of prices).*



Amendment 47  
Article 13, paragraph 2b (new)

***2b. Senders of unsolicited electronic mail shall supply with their messages an address to which the recipient may send a request that such communications cease.***

Amendment 48  
Article 13, paragraph 3

3. Paragraphs ***1 and 2*** shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

3. ***Previous*** paragraphs shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

Amendment 49  
Article 14, paragraph 3

3. ***Where required, the Commission shall*** adopt measures to ensure that terminal equipment ***incorporates the necessary safeguards to guarantee the protection of personal data and privacy of users and subscribers,*** in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC

3. ***As concerns arise with categories of products, it may be necessary to*** adopt measures to ensure that terminal equipment ***is constructed in a way that is compatible with users' right to protect and control the use of their personal data,*** in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC

*Justification*

*This amendment makes sure that the privacy of users and their personal data are better protected. Prohibiting the development of technical equipment that will infringe users' rights has a stronger preventive effect than reacting against the infringement itself.*

*This amendment clarifies that terminal equipment should not infringe individuals' privacy, instead of the original wording which suggests that terminal equipment should incorporate safeguards.*

Amendment 50  
Article 15, paragraph 1

1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1) to (4), and Article 9 of this Directive when such restriction constitutes a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC.

1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1) to (4), and Article 9 of this Directive when such restriction constitutes a necessary, ***appropriate, proportionate and limited in time*** measure ***within a democratic society*** to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. ***These measures must be entirely exceptional, based on a specific law which is comprehensible to the general public and be authorised by the judicial or competent authorities for individual cases. Under the European Convention on Human Rights and pursuant to rulings issued by the Court of Human Rights, any form of wide-scale general or exploratory electronic surveillance is prohibited.***

*Justification*

*This amendment is intended to ensure that Member States cannot, in breach of the Human Rights Convention, the case-law of the Court of Human Rights and Community law, make use of exemptions to restrict the fundamental right to protection of privacy.*

Amendment 51  
Article 15, paragraph 3

3. The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC shall also carry out the tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive, ***namely the protection of fundamental rights and freedoms and of legitimate interests in the electronic communications sector.***

3. The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC shall also carry out the tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive.

*Justification*

*Article 30 of Directive 95/46/EC covers more than just fundamental rights or legitimate interests. It is preferable to include the reference to Article 30 without making a partial resumé.*

Amendment 52  
Article 16

Article 12 shall not apply to editions of directories published before the national provisions adopted pursuant to this Directive enter into force

***1. Article 12 shall not apply to editions of directories already produced or placed on the market in printed or off-line electronic form before the national provisions adopted pursuant to this Directive enter into force.***

***2. Where the personal data of subscribers to fixed public voice telephony services have been included in a public subscriber directory in conformity with the provisions of Article 11 of Directive 97/66/EC before the national provisions adopted in pursuance of this Directive enter into force, the personal data of such subscribers may remain included in this public directory in its printed or electronic versions, unless subscribers indicate otherwise, after having received complete information about purposes and options in conformity with Article 12 of this Directive.***

*Justification*

*With a view to giving the directive the best possible chance of being adopted at first reading, this amendment contains as much of the text informally approved by the Council working party as was deemed appropriate.*

## DRAFT LEGISLATIVE RESOLUTION

### **European Parliament legislative resolution on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))**

#### **(Codecision procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2000) 385<sup>1</sup>),
  - having regard to Article 251(2) of the EC Treaty and Articles 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0439//2000),
  - having regard to Rule 67 of its Rules of Procedure,
  - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinions of the Committee on Legal Affairs and the Internal Market, the Committee on Industry, External Trade, Research and Energy and the Committee on the Environment, Public Health and Consumer Policy (A5-0270/2001),
1. Approves the Commission proposal as amended;
  2. Asks to be consulted again should the Commission intend to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

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<sup>1</sup> OJ C 365, 19.12.2000, p. 223

## EXPLANATORY STATEMENT

### \* Introduction

The proposed directive introduces significant changes with respect to Directive 97/66/EC. The definitions are updated so as to bring them into line with developments in telecommunications technologies, and special arrangements are introduced for some types of personal data (traffic data and location data) and some technologies (e-mail, electronic directories).

### \* Technological neutrality

The need for a separate directive covering electronic communications is in itself questionable, since general Directive 95/46/EC lays down general principles covering the protection of privacy, which can easily be adapted to the various technologies. The proposed introduction of special arrangements for some types of data which hinge on the use of specific technologies could well make matters extremely confusing for national legislative authorities and, all the more so, for the legal authorities.

The need to ensure the 'technological neutrality' of privacy rules is one of the Commission's main arguments for proposing this directive. The rapporteur considers, however, that technological neutrality is to be secured through rules and principles that may be applied to all technologies, rather than through a process of continuous updating as new technologies appear on the market. In other words, the legislation should regulate the processing of data, not the technologies which enable use to be made of those data.

### \* A single legislative framework

It would therefore be preferable for the Commission to revise the parent directive at the earliest opportunity (a report on the implementation of Directive 95/46/EC is anyway to be submitted by October 2001, together with proposed amendments, where appropriate), and to incorporate the specific proposals for each sector, not just the telecommunications sector. This would make the legislation more consistent and homogeneous.

The need to ensure that the legislative authorities' activities are not spread over too wide an area is reinforced by the fact that transposition of both directives has proved problematic:

- Directive 95/46/EC has been transposed by 6 Member States (EL, P, S, I, B, FIN). Nine have yet to do so, 5 of which (F, D, L, NL, IRL) have been brought before the Court of Justice by the Commission. A ruling has already been delivered against one of them (France).

- Directive 97/66/EC has been transposed by 6 Member States (D, E, FIN, I, NL, P).

It would therefore appear wise to consolidate the European legislative authorities' efforts vis-à-vis the Member States.

### \* Proposed amendments

Detailed justifications are given for the proposed amendments.

29 May 2001

## **OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))

Draftsman: Astrid Thors

### **PROCEDURE**

The Committee on Legal Affairs and the Internal Market appointed Astrid Thors draftsman at its meeting of 13 September 2001.

It considered the draft opinion at its meetings of 14 and 29 May 2001.

At the latter meeting it adopted the following amendments unanimously.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; Willi Rothley, vice-chairman; Astrid Thors, draftsman; Bert Doorn, Francesco Fiori (for Antonio Tajani pursuant to Rule 153(2)), Janelly Fourtou, Françoise Grossetête, Gerhard Hager, Malcolm Harbour, Heidi Anneli Hautala, The Lord Inglewood, Kurt Lechner, Klaus-Heiner Lehne, Hans-Peter Mayer, Arlene McCarthy, Manuel Medina Ortega, Bill Miller, Angelika Niebler, Elena Ornella Paciotti, Gary Titley, Diana Wallis, Joachim Wuermeling and Stefano Zappalà.

## SHORT JUSTIFICATION

### The Commission proposal

The purpose of the Commission's proposal for a directive is to maintain a high level of protection for personal data and privacy in the context of all electronic communications services, regardless of the technology used. It is intended to replace European Parliament and Council Directive 97/66/EC of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, which had to be transposed by 24 October 1998 at the latest. However, this was not done in all Member States, and in January 2000 the Commission decided to take legal action against France, Luxembourg, the Netherlands, Germany and Ireland, as they had not notified the required implementing provisions.

The proposal does not make any major changes to the substance of the existing Directive, for its main purpose is to update the existing provisions and adapt them to take account of new electronic communications services and technology.

In order to be technology neutral, it is proposed that definitions of telecommunications services and networks be replaced by definitions of electronic communications services and networks, such definitions corresponding to the terminology in the proposed directive establishing a common framework for electronic communications services and networks. Moreover, four new definitions are introduced: of calls, communications, traffic data and location data.

### Rapporteur's assessment

The fact that there are two separate directives on data confidentiality and the protection of privacy, namely the proposal for a European Parliament and Council directive on universal service and users' rights relating to electronic communications networks and services (COD000183 - COM(2000) 392) and the proposal under consideration here, should be regarded as an emergency solution. The Commission has announced that it will this year assess the need for a comprehensive revision of the general directive. It would be a good idea if the two directives were to be amalgamated and, in order to facilitate this, your rapporteur considers that certain passages on users' rights in communications networks should be transferred from this proposal to the universal service directive.

The right of employers to monitor their employees is a thorny and sensitive issue. It does not actually fall within the scope of this proposal, but your rapporteur wishes to draw attention to the problems and call on the Member States to tackle the problem. Unsolicited mass communications by e-mail (spamming) is another area of concern which must be regulated effectively.

## AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:



Amendment 1  
Citation 4a (new)

***having regard to Articles 7 and 8 of the European Union Charter of fundamental rights, proclaimed in Nice on 7 December 2000, which seek to guarantee respect for private life and communications, including personal data,***

Amendment 2  
Recital 11a (new)

***(11a) The development of the information society gives rise to new problems concerning the right of employers to monitor their employees. Where much of the work is performed by employees who are mobile, the question arises as to whether employers may use the new location services that are available to monitor the whereabouts of their employees. Controversy also exists as to whether an employer has the right to monitor his employees' electronic mail where they use either the employer's electronic address or only his technical equipment.***

*Justification*

*When transposing the directive, Member States must take account of the issue of protecting privacy at work, which will raise new problems. This point should be borne in mind when Article 15 is transposed into national legislation.*

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<sup>1</sup> OJ C 365 E, 19.12.2000, pp. 223-229.

Amendment 3  
Recital 13

***(13) Service providers should take appropriate measures to safeguard the security of their services, if necessary in conjunction with the provider of the network, and inform subscribers of any special risks of a breach of the security of the network. Such risks may especially occur for electronic communications services over an open network such as the Internet. It is particularly important for subscribers and users of such services to be fully informed by their service provider of the existing security risks which are outside the scope of possible remedies by the service provider. Service providers who offer publicly available electronic communications services over the Internet should inform users and subscribers of measures they can take to protect the security of their communications for instance by using specific types of software or encryption technologies. Security is appraised in the light of Article 17 of Directive 95/46/EC.***

***Deleted***

*Justification*

*Having two separate directives on data protection and the protection of privacy is not an ideal solution. In order to facilitate the merger of the two directives, which would be a very good idea, the rapporteur is proposing that those points which most closely concern the rights of users in communications networks be transferred to the proposal for a directive on universal service and users' rights relating to electronic communications networks and services (COD000183 - COM(2000) 392), which is currently being considered.*

Amendment 4  
Recital 15

(15) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information

(15) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information

contain information on the private life of natural persons who have a right to respect for their *correspondence*. ***The legitimate interests of legal persons should also be protected.*** Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform for the marketing of *its own* electronic communications services or for the provision of *value added services*, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his consent to such processing. Traffic data used for marketing of own communications services or for the provision of value added services should also be erased or made anonymous after the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.

contain information on the private life of natural persons who have a right to respect for their *communications*. Such data may only be stored to the extent that is necessary for the provision of the service ***and*** for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform for the marketing of electronic communications services or for the provision of ***other services which have an objective link with communications services***, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his consent to such processing. Traffic data used for marketing of own communications services or for the provision of value added services should also be erased or made anonymous after the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.

#### *Justification*

*The term 'objective link' is used in general data protection legislation. The term 'value-added services' does not yet appear to have a firmly established definition and perhaps will not cover all the services that will be connected to what are known as navigation services or the marketing thereof.*

Amendment 5  
Recital 21a (new)

***(21a.) Rules on the treatment of unsolicited mail for the purposes of direct advertising are already contained in Article 10 of the Directive on the protection of consumers in respect of distance contracts (97/7/EC) and in Article 7 of the Directive on electronic commerce (2000/31/EC). Under the terms of those directives, the Member States decide whether the sending of unsolicited electronic mail is to be made dependent on the express prior consent of the recipient (the ‘opt-in’ solution) or whether the message is permitted so long as the recipient does not object (the ‘opt-out’ solution). The practical effects of the Member States’ various approaches to a solution will have to be observed before one of the two approaches is made binding at European Union level.***

*Justification*

*This amendment seeks to resolve a question which has already been discussed in detail in the European Parliament in the context of consultations on the e-commerce directive.*

*The European Parliament, in adopting Article 7 of the e-commerce directive, has stated its support for the view that, until the directive is officially revised in 2003 (Article 21 of the directive), the Member States are permitted to decide whether the sending of unsolicited electronic mails is to be made dependent on the express prior permission of the recipient (the ‘opt-in’ solution) or whether the mail is permissible so long as the recipient does not object to it (the ‘opt-out’ solution).*

*Since that decision was taken, the state of affairs has not significantly changed. Aspects of consumer protection, the cost to ISPs of the transmission of e-mails, the general freedom of communications and the interests of the advertising industry and trade in the field of e-commerce should also be taken into account. Nor does there seem to be any justification from the point of view of technological neutrality for Parliament's backing up a different position at this time.*

Amendment 6  
Article 4

**1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public electronic communications network with respect to network security. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.**

**2. In case of a particular risk of a breach of the security of the network, the provider of a publicly available electronic communications service must inform the subscribers concerning such risk and any possible remedies, including the costs involved.**

*Deleted*

*Justification*

*See justification for Amendment 3.*

Amendment 7  
Article 6, paragraph 2

2. Traffic data which are necessary for the purposes of **subscriber** billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

2. Traffic data which are necessary for the purposes of billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

*Justification*

*The reference to subscribers should be deleted, as not only end users, who are subscribers in the contractual context, but also other parties who act as intermediaries, are billed.*

Amendment 8  
Article 6, paragraph 3

3. For the purpose of marketing its own electronic communications services or for the provision of **value added** services to the subscriber, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services, if the subscriber has given his consent.

3. For the purpose of marketing its own **or other persons'** electronic communications services or for the provision of **its own or other persons'** services to the subscriber, **provided that such services have an objective link with the communications services**, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services, if the subscriber has given his **prior** consent.

*Justification*

*The term 'objective link' is used in general data protection legislation. The term 'value-added services' does not yet appear to have a firmly established definition and perhaps will not cover all the services that will be connected to what are called navigation services or the marketing thereof.*

*The Commission's wording if Article 6(3) appears only to cover such services as are provided by providers of publicly available electronic communications services. With the subscriber's consent, however, other parties who provide electronic communications services should also be given the opportunity to process traffic data. The same applies to the marketing of electronic communications services.*

*The protection of consumers will be strengthened if their consent has to be obtained in advance.*

Amendment 9  
Article 9, paragraph 1

1. Where electronic communications networks are capable of processing location data other than traffic data, relating to users or subscribers of their services, these data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users

1. Where electronic communications networks are capable of processing location data other than traffic data, relating to users or subscribers of their services, these data may only be processed when they are made anonymous, or with the **prior** consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider

or subscribers, prior to obtaining their consent, of the type of location data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service.

must inform the users or subscribers, prior to obtaining their consent, of the type of location data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service.

#### *Justification*

*The purpose of this amendment is to strengthen consumer protection.*

#### Amendment 10 Article 12, paragraph 1

1. Member States shall ensure that subscribers are informed , free of charge, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data **can be** included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

1. Member States shall ensure that subscribers are informed , free of charge, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data **have been** included **for the first time** and of any further **significant** usage possibilities based on search functions embedded in electronic versions of the directory.

#### *Justification*

*The Commission's proposal that certain subscriber data, such as mobile telephone number and e-mail address, should no longer be included as a matter of course in public subscriber directories, is to be welcomed. However, for practical reasons subscribers should only be asked for consent to the publication of their data before their first inclusion in the directory. For data already in directories, it is sufficient that they have the option to have such data deleted free of charge.*

Amendment 11  
Article 12, paragraph 2

2. Member States shall ensure that subscribers are given the opportunity, free of charge, to **determine whether** their personal data **are included in** public directories, **and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data.**

2. Member States shall ensure that subscribers are given the opportunity, free of charge, to **have all or some of** their personal data, **including e-mail addresses, deleted, amended, corrected or withdrawn from** public directories. **Where personal data are not yet included in public directories, the consent of the subscriber shall be sought before the data are included**

*Justification*

*In many Member States, a general population register is available on the network, and the authorities can sell the information it contains. If a person makes a specific request, he/she can have his details deleted from the register. There are grounds for applying the same principles in this case. Sound protection of traffic data and location data will make it possible to prevent a great deal of inconvenience and trouble.*

*The Commission's proposal that certain subscriber data, such as mobile telephone number and e-mail address, should no longer be included as a matter of course in public subscriber directories, is to be welcomed. However, for practical reasons subscribers should only be asked for consent to the publication of their data before their first inclusion in the directory. For data already in directories, it is sufficient that they have the option to have such data deleted free of charge.*

Amendment 12  
Article 13, paragraph 1

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) **or electronic mail** for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.



### *Justification*

*This amendment seeks to replace the proposed ban for unsolicited commercial communications by e-mail by a less restrictive but more efficient measure which consist of an obligation on direct marketing enterprises to indicate in all commercial e-mail where they obtained the e-mail address of the subscriber. This would contribute to a more efficient enforcement of the provisions in the data protection directives concerning lawfulness of personal data collection.*

*In line with the recently adopted electronic commerce directive, this amendment would leave open the possibility for Member States to allow unsolicited commercial communications provided that the latter complies with an “opt out” approach.*

*Whilst major enterprises could afford traditional advertising media campaigns in all the Member States, unsolicited commercial communications may be the only affordable means by which small and medium sized enterprises could effectively promote their products and services across borders.*

### Amendment 13

Article 13, paragraph 2a (new)

***2a (new) Senders of unsolicited electronic mail shall supply with their messages an address to which the recipient may send a request that such communications cease.***

### Amendment 14

Article 13, paragraph 3a (new)

***3a. In addition to the information requirements relating to unsolicited commercial communications established in article 7 paragraph 1 of directive 2000/31/EC, information on how the subscriber’s electronic mail address was obtained shall be provided within each unsolicited electronic mail used for the purpose of direct marketing.***

### *Justification*

*This amendment seeks to replace the proposed ban for unsolicited commercial communications by e-mail by a less restrictive but more efficient measure which consist of an obligation on direct marketing enterprises to indicate in all commercial e-mail where they obtained the e-mail*

*address of the subscriber. This would contribute to a more efficient enforcement of the provisions in the data protection directives concerning lawfulness of personal data collection.*

*In line with the recently adopted electronic commerce directive, this amendment would leave open the possibility for Member States to allow unsolicited commercial communications provided that the latter complies with an “opt out” approach.*

*Whilst major enterprises could afford traditional advertising media campaigns in all the Member States, unsolicited commercial communications may be the only affordable means by which small and medium sized enterprises could effectively promote their products and services across borders.*

Amendment 15  
Article 17, paragraph 3a (new)

***3a. Member States shall ensure that promotion and development of cross-border electronic communications' services and networks are not hindered.***

2 July 2001

## **OPINION OF THE COMMITTEE ON INDUSTRY, EXTERNAL TRADE, RESEARCH AND ENERGY**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))

Draftsperson: Ilka Schröder

### **PROCEDURE**

The Committee on Industry, External Trade, Research and Energy appointed Ilka Schröder draftsperson at its meeting of 22 June 2001.

It considered the draft opinion at its meetings of 13 September 2000, 25 April 2001, 25 and 29 May 2001 and 12 June 2001.

At the last meeting it adopted the following amendments with 1 abstention.

The following were present for the vote: Carlos Westendorp y Cabeza, chairman Peter Michael Mombaur, vice-chairman; Ilka Schröder, draftsman; Konstantinos Alyssandrakis, Ward Beysen (for Willy C.E.H. De Clercq), Yves Butel, Massimo Carraro, Giles Bryan Chichester, Nicholas Clegg, Harlem Désir, Raina A. Mercedes Echerer (for Caroline Lucas), Colette Flesch, Christos Folias, Glyn Ford, Jacqueline Foster (for Roger Helmer), Neena Gill (for Mechtild Rothe), Norbert Glante, Alfred Gomolka (for Werner Langen), Michel Hansenne, Hans Karlsson, Rolf Linkohr, Eryl Margaret McNally, Erika Mann, Angelika Niebler, Reino Paasilinna, Elly Plooij-van Gorsel, John Purvis, Daniela Raschhofer, Imelda Mary Read, Christian Foldberg Røvsing, Gilles Savary (for François Zimeray), Konrad K. Schwaiger, Esko Olavi Seppänen, Astrid Thors, Jaime Valdivielso de Cué, W.G. van Velzen, Alejo Vidal-Quadras Roca, Dominique Vlasto and Olga Zrihen Zaari.

## SHORT JUSTIFICATION

This proposal for a Directive, which forms part of the new regulatory framework for telecommunications, is not a totally new piece of legislation: it is intended to supersede the existing Directive 97/66/EC, and is but a particular implementation of the principles embodied in the general data protection Directive.

However, the proposed text is not just a technical adaptation. As telecommunications become present in all aspects and at all moments of daily life, the amount of information that can be collected increases in quantity and accurateness. The new technologies that state-of-the-art telecommunications make available entail specific problems which entail a quantum leap in the significance of such information as traffic or location data.

In both fields of political rights and freedoms and exposure to commercial targeting, the citizens are entitled to a safeguard of their privacy. The general 1995 Directive, however imperfect it can be judged, covers the content information. Both for this kind of information and for traffic data, we are aware of - though of course not happy with - the limitations as to the competence of Parliament in particular and more generally the EU at large when it comes to the protection of the individual against misuse of information by public authorities. Still the issue should be pointed out that wherever there are possibilities for law enforcement authorities and security services to legally intercept, there will always be the risk of abuse - be it by the authorities themselves which may exceed their competences, be it by unauthorised natural or legal persons.

A strict control on how the technical data is collected, stored and processed, by whom, and towards what end, is therefore a pre-condition to prevent such abuses. In particular technological tools must be implemented and used to ensure that information collected towards a given aim is not used outside of the field for which its collection is legitimate, and that it does not exceed the requirements of this use.

Proper information of the subscribers and users must be ensured, and an enlightened consent be obtained prior to any data collection that is necessary for a given service.

More generally, it is foreseeable that with future technologies such as broadband access in connection with an always online status, Internet-based telephony, location-based services for UMTS mobile phones, the borders between different kinds of data - traffic data, location data, user data, contents data - will become more and more indistinguishable. It should be made clear therefore that wherever different kinds of data melt in a way that they cannot be separated any more, the strictest rules should apply, e.g. when traffic data and contents data become so entangled that they can't be separated any more, the rules for content data should apply to the whole "data ball".

## AMENDMENTS

The Committee on Industry, External Trade, Research and Energy calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission<sup>1</sup>

Amendments by Parliament

### Amendment 1 Recital 8

(8) The Member States, providers and users concerned, together with the competent Community bodies, should cooperate in introducing and developing the relevant technologies where this is necessary to apply the guarantees provided for by this Directive ***and taking particular account of the objectives of minimising the processing of personal data and of using anonymous or pseudonymous data where possible.***

(8) The Member States, providers and users concerned, together with the competent Community bodies, should ***ensure that the processing of personal data is limited to a minimum and uses anonymous or pseudonymous data wherever possible and they must*** cooperate in introducing and developing the relevant technologies where this is necessary to apply the guarantees provided for by this Directive.

### *Justification*

*This wording insists on the priority that protection of the personal information must enjoy, compared to the rather weak formulation in the Commission's proposal.*

### Amendment 2 Recital 14

(14) Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications

(14) Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications

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<sup>1</sup> OJ C 365 19.12.2000, p. 223.

services. ***National legislation in some Member States only prohibits intentional unauthorised access to communications.***

services. ***These measures should include the facilitation of proven cryptography and anonymisation or pseudonymisation tools.***

### *Justification*

*Effective protection cannot rely on legal measures only, whatever their extent. The general availability of adequate tools must be ensured.*

### Amendment 3

#### Recital 15

(15) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons who have a right to respect for their correspondence. The legitimate interests of legal persons should also be protected. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform for the marketing of its own electronic communications services or for the provision of value added services, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his consent to such processing. Traffic data used for marketing of own communications services or for the provision of value added services should also be erased or made anonymous after

(15) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons who have a right to respect for their correspondence. The legitimate interests of legal persons should also be protected. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform for the marketing of its own electronic communications services or for the provision of value added services, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw ***through an easy and proportionate procedure*** his or her consent to such processing, ***and provided that refusing this consent does not in any way restrict his or her ability to subscribe***

the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.

***to the services or enjoy the full extent of his or her rights under the contract.***

Traffic data used for marketing of own communications services or for the provision of value added services should also be erased or made ***irreversibly*** anonymous after the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.

*(Note: gender-marked qualifications to be adapted throughout the text with a view towards sex neutrality).*

#### *Justification*

*Such protective measures become void if they are too complicated to exercise or if they jeopardise the rights and possibilities that subscribers expect from the services.*

#### Amendment 4 Recital 15a (new)

***(15a) For the interpretation of article 6 of this directive it must be noted that systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum. Any activities related to the provision of the electronic communications service that go beyond the transmission of a communication and the billing thereof must be based on aggregated, unidentifiable traffic data.***

***Where such activities cannot be based on aggregated data, for instance for the purpose of customer care, maintenance, quality control or fraud detection by the provider of a electronic communications network or service, they should be considered as value added services for which the prior consent of the subscriber is required. In these cases the data needed for***

*these specific purposes may be processed for a period of maximum 2 months.*

#### *Justification*

*This new recital clarifies that the storage of traffic data should be limited to the minimum necessary for the transmission of a communication. Anything that goes further than that may be subject to abuse or intrusion to the fundamental privacy of the user, and should therefore be protected by aggregation and anonymisation.*

*Cases can occur where the data should not be aggregated or made anonymous in order to offer services to users, without infringing their privacy-rights. These cases are customer care (for instance in case of a malfunction of the service of an individual subscriber), maintenance, quality control and fraud detection by the provider (and not of the law enforcement agencies, which have their provisions in article 15). For these cases an exception can be made, with the prior consent of the subscriber concerned.*

*Therefore this recital is useful.*

#### Amendment 5

##### Recital 16

(16) The introduction of itemised bills has improved the possibilities for the subscriber to check the accuracy of the fees charged by the service provider but, at the same time, it may jeopardise the privacy of the users of publicly available electronic communications services. Therefore, in order to preserve the privacy of the user, Member States should encourage the development of electronic communication service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available electronic communications services, for example calling cards ***and facilities for payment by credit card.***

(16) The introduction of itemised bills has improved the possibilities for the subscriber to check the accuracy of the fees charged by the service provider but, at the same time, it may jeopardise the privacy of the users of publicly available electronic communications services. Therefore, in order to preserve the privacy of the user, Member States should encourage the development of electronic communication service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available electronic communications services, for example calling cards.

#### *Justification*

*Credit cards are not an adequate example in this context.*



Amendment 6  
Recital 18, last sentence

The privacy options which are offered on a per-line basis do not necessarily have to be available as an automatic network service but may be obtainable through a simple request to the provider of the publicly available electronic communications service.

The privacy options which are offered on a per-line basis do not necessarily have to be available as an automatic network service but may be obtainable ***free of charge*** through a simple ***and standardised*** request to the provider of the publicly available electronic communications service.

*Justification*

*These privacy options are an essential right and not a "value added service". The need to be able to use them on all kinds of networks or origination points (public payphones, third-party lines, etc.) means that it must be possible for them to be activated with identical codes on all networks.*

Amendment 7  
Recital 21a (new)

***(21a) Spamming – the bulk sending of untargeted unsolicited e-mails – is already covered by special protection measures, in particular by Article 7(1) of Directive 2000/31/EC, by Articles 6 and 7 of the general data protection Directive 95/46/EC, by Directive 84/450/EEC on misleading advertising and by Directive 93/13/EC on unfair terms in consumer contracts.***

*Justification*

*Existing, current legislation can be used to combat spamming and, therefore, there is no need for a new, rigid and cost-increasing legislation that most likely will not have an effect on spamming.*

Amendment 8  
Article 2, paragraph 2, point (b)

(b) 'traffic data' means any data processed in the course of or **for the purpose** of the transmission of a communication over an electronic communications network;

(b) 'traffic data' means any data processed in the course of or **necessary to ensure** the transmission of a communication over an electronic communications network;

*Justification*

*This amendment makes it possible that service providers retain only what is generally necessary to ensure communication over an electronic network, which does not include transient storage of traffic data during transmission nor all the (additional) information that could be asked by various interested parties.*

Amendment 9  
Article 2, point (e a) (new)

***(e a) "Electronic mail" means any text, voice, sound or image message sent over an electronic communications network which can be stored in the network or in the recipient's terminal equipment, which is addressed directly or indirectly to one or more natural or legal persons.***

*Justification*

*This addition ensures that e-mails, SMS-messages, sound-attachments, pictures as well as digital movies are included in the scope of this Directive.*

Amendment 10  
Article 5, paragraph 2

2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.

2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication. ***Employment relationship***

***and industrial relations are not to be regarded as business communication within the sense of this paragraph.***

*Justification*

*Business communication should only encompass the operational activity of an organisation.*

Amendment 11  
Article 5, paragraph 2a (new)

***2a. Member States shall prohibit the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user without the prior, explicit consent of the subscriber or user concerned. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network.***

*Justification*

*Terminal equipment of users of electronic communications networks and any information stored on such equipment are part of the private sphere of the users requiring protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms. So-called cookies, spyware, web bugs, hidden identifiers and other similar devices that enter the users' terminal equipment without their explicit knowledge or explicit consent in order to gain access to information, to store hidden information or to trace the activities of the user may seriously intrude the privacy of these users. The use of such devices should therefore be prohibited unless the explicit, well-informed and freely given consent of the user concerned has been obtained.*

Amendment 12  
Article 6, paragraph 1

1. Traffic data relating to subscribers and users processed for the purpose of the transmission of a communication and

1. Traffic data relating to subscribers and users processed for the purpose of the transmission of a communication and

stored by the provider of a public communications network or service must be erased or made anonymous upon completion of the transmission, ***without prejudice to the provisions*** of paragraphs 2, 3 and 4.

stored by the provider of a public communications network or service must be erased or made ***irreversibly*** anonymous upon completion of the transmission, ***with due regard for the requirements*** of paragraphs 2, 3 and 4, ***and so as to allow for proper implementation of paragraph 6.***

#### *Justification*

*The need for further exploitation of data is not per se a legitimate reason for lifting the requirement of individual protection when alternative means exist such as pseudonymisation, statistical format, etc.*

#### Amendment 13 Article 6, paragraph 6

6. Paragraphs 1, 2, 3 and 5 shall ***apply without prejudice to the possibility*** for competent authorities to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.

6. Paragraphs 1, 2, 3 and 5 ***shall be implemented so as to allow*** for competent authorities to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.

#### *Justification*

*The need for further exploitation of data is not per se a legitimate reason for lifting the requirement of individual protection when alternative means exist such as pseudonymisation, statistical format, etc.*

#### Amendment 14 Article 6, paragraph 6a (new)

***6a. The duration of processing or retaining of data, mentioned in this directive, shall be limited to a reasonable period, with respect to the purposes of those processes, and will not be longer than several months.***

***The retained data, both content and traffic details, shall only be accessed by law enforcement authorities for purposes of investigating infringements covered by criminal law and shall not be accessed for the purpose of intelligence-gathering or data-mining.***

#### *Justification*

*Traffic data must be protected by the principle of confidentiality to the same extent as content data, as also stated in Article 8 of the European Convention on Human Rights. There is no need for commerce to keep data except for very limited periods. Limitation of the duration of data-retaining (as well as anonymity of that data) will create confidence in electronic communications systems by citizens.*

*The second addition aims at avoiding that law enforcement takes precedence over the privacy and freedom of people. It is important to find a solution that is well-founded, proportionate and well-balanced. Therefore investigations must in any case be proportionate, and can only be permitted as a consequence of reasonable doubts. This addition prevents so-called fishing expeditions and data-mining, which are harmful intrusions to the fundamental right of privacy of the European citizen.*

#### Amendment 15 Article 12, paragraph 1

1. Member States shall ensure that subscribers are informed , free of charge, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

1. Member States shall ensure that subscribers are informed, free of charge ***and before they are included in the directory***, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

#### *Justification*

*This addition improves the choice of consumers to be inserted or not in future directories. Deciding not to be included any more in a directory which has already been published will not have the same effect as choosing not to be inserted in the first place.*

Amendment 16  
Article 12, paragraph 2

2. Member States shall ensure that subscribers are given the opportunity, free of charge, to determine whether their personal data are included in public directories, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data.

2. Member States shall ensure that subscribers are given the opportunity, free of charge, to determine whether their personal data are included in public directories, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. ***Subscribers shall be appropriately informed about the planned entry in a public directory. If the subscriber does not object, personal details may be included in the public directory.***

*Justification*

*The purpose of public directories is to make publicly available information easily accessible to everyone. Subscribers who have doubts about the inclusion of their personal data should have sufficient opportunity to object to such inclusion or to have their data deleted at any time.*

Amendment 17  
Article 9, paragraph 1, first sentence

Where electronic communications networks are capable of processing location data other than traffic data, relating to users or subscribers of their services, these data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service.

Where electronic communications networks are capable of processing location data other than traffic data, relating to users or subscribers of their services, these data may only be ***collected, stored and*** processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service ***specifically asked for by the user.***

### *Justification*

*The user's consent must be given in full awareness of its implications. Additionally, a more accurate definition of involved actions is necessary to avoid ambiguous situations.*

### Amendment 18 Article 13, paragraph 2

2. Member States shall take appropriate measures to ensure that, ***free of charge***, unsolicited communications for purposes of direct marketing, by means other than those referred to in paragraph 1, are not allowed ***either*** without the consent of the subscribers concerned ***or in respect of*** subscribers who do not wish to receive these communications, ***the choice between these options to be determined by national legislation.***

2. Member States shall take appropriate measures to ensure that unsolicited communications for purposes of direct marketing, by means other than those referred to in paragraph 1, are not allowed without the ***prior, explicit and specific*** consent of the subscribers concerned ***and that*** subscribers who do not wish to receive these communications ***or wish to withdraw their previous consent can request it free of charge and through a procedure as straightforward as the one they can use to give their consent.***

### *Justification*

*The user's consent must be given in full awareness of its implications. Additionally, the present frequent situation where accepting to receive unsolicited information is made easy (eg. ticking a checkbox on a web page) and cancelling or refusing is made difficult (eg. sending a registered letter to a postal address).*

### Amendment 19 Article 14, paragraph 3

3. ***Where required, the Commission*** shall adopt measures ***to ensure that*** terminal equipment ***incorporates the necessary safeguards to guarantee the protection of personal data and privacy of users and subscribers,*** in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC

3. ***As concerns arise with categories of products, it shall be necessary to*** adopt measures to ensure that terminal equipment ***is constructed in a way that is compatible with users' right to protect and control the use of their personal data,*** in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC

### *Justification*

*This amendment makes sure that the privacy of users and their personal data are better protected. Prohibiting the development of technical equipment that will infringe users' rights has a stronger preventive effect than reacting against the infringement itself.*

*This amendment clarifies that terminal equipment should not infringe individuals' privacy, instead of the original wording which suggests that terminal equipment should incorporate safeguards*

### Amendment 20 Article 15, paragraph 1

1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1) to (4), and Article 9 of this Directive when such restriction constitutes a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC

1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1) to (4), and Article 9 of this Directive when such restriction constitutes a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. ***These restrictions must contain for each specific case a demonstrable, democratically controllable need.***

### *Justification*

*In order to prevent infringements of the European Convention on Human Rights, the mentioned restrictions must be clearly documented in a way which can be controlled in a democratic way, for instance by a parliamentary committee for national security.*

### Amendment 21 Article 15, paragraph 3

3. The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC shall also carry out the

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tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive, namely the protection of fundamental rights and freedoms and of legitimate interests in the electronic communications sector.

tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive, namely the protection of fundamental rights and freedoms and of legitimate interests in the electronic communications sector.

***The Working Party shall take the utmost account of the views of all interested parties, including industry and consumers. The Working Party shall state to what extent the views of interested parties have been heard and taken into account and shall give interested parties the opportunity to comment within a reasonable time frame, proportionate to the importance of the issue considered.***

#### *Justification*

*Since the Working Group is currently composed only of members of the national data protection authorities, the advice from the Working Party can be provided in a more transparent way by enabling discussion with interested parties like industry and consumer organisations. This will result in improvements in balancing interests involved, providing a greater sense of reality and more practical advice and opinions.*

#### Amendment 22 Article 16

Article 12 shall not apply to ***editions of*** directories published before the national provisions adopted pursuant to this Directive enter into force.

Article 12 shall not apply to directories published before the national provisions adopted pursuant to this Directive enter into force.

#### *Justification*

*This deletion prevents that copies of directories which have already been published and distributed, might have to be confiscated.*

*Moreover, electronic available directories should also enjoy a transitional arrangement, which will be achieved by this amendment*

7 March 2001

## **OPINION OF THE COMMITTEE ON THE ENVIRONMENT, PUBLIC HEALTH AND CONSUMER POLICY**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the proposal for a European Parliament and Council directive on processing of personal data and the protection of privacy in the electronic communications sector  
(COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))

Draftsman: Emmanouil Bakopoulos

### **PROCEDURE**

The Committee on the Environment, Public Health and Consumer Policy appointed Emmanouil Bakopoulos draftsman at its meeting of 19 September 2000.

It considered the draft opinion at its meeting of 9 January 2001.

At the latter meeting it adopted the following amendments unanimously.

The following were present for the vote: Guido Sacconi, acting chairman; Alexander de Roo, vice-chairman; Emmanouil Bakopoulos, draftsman (for Mihail Papayannakis); Per-Arne Arvidsson, Jean-Louis Bernié (for Jean Saint-Josse), Hans Blokland, John Bowis, Dorette Corbey, Avril Doyle, Marialiese Flemming, Karl-Heinz Florenz, Cristina García-Orcoyen Tormo, Laura González Álvarez, Robert Goodwill, Cristina Gutiérrez Cortines, Anneli Hulthén, Bernd Lange, Minerva Melpomeni Malliori, Patricia McKenna, Emilia Franziska Müller, Giuseppe Nisticò, Dagmar Roth-Behrendt, Karin Scheele, Ursula Schleicher (for Martin Callanan), Inger Schörling, Jonas Sjöstedt, María Sornosa Martínez, Dirk Sterckx (for Frédérique Ries), Antonios Trakatellis and Kathleen Van Brempt (for Guido Sacconi).

## SHORT JUSTIFICATION

The proposed directive is intended to replace the existing Directive 97/66/EC in force concerning the processing of personal data and the protection of privacy in the telecommunications sector.

The purpose of the proposal, as the introduction to the proposal for a directive states, is not to create major changes to the substance of the existing Directive 97/66/EC, but merely to adapt existing provisions to new developments in technology. A number of provisions of the existing Directive are therefore carried over unchanged in the new proposal.

The adjustment to new technologies is achieved by creating rules which are technologically neutral, that is do not require the use of a particular type of technology, and by introducing appropriate definitions corresponding to the new technologies.

It should also be pointed out, as Article 3 makes clear, that the proposed directive will apply to publicly available electronic communications services, and not private or closed networks which will be covered by the general data protection Directive 95/46/EC.

Directive 95/46/EC continues to apply, of course, and this is spelt out in Recital 9 of the proposed directive. The amendments tabled to the proposal for a directive belong within the framework of the above objectives of the authors of the proposal.

The following issues of concern merit further examination:

- Traffic data may, according to both the directive currently in force (97/66/EC) and the proposed directive, only be stored and processed during the time necessary for billing. However, the maximum time allowed for this differs widely between the EU Member States, a fact that could result in differences in protection of the privacy of the users or subscribers in different countries of the Union.
- The new Commission proposal introduces the right for providers of publicly available electronic communications services to process traffic data for the provision of value added services to the user or subscriber. The draftsman considers it necessary to define the term value added service, especially as the service provider and the user may have differing views on what should be labelled a value added service.

## AMENDMENTS

The Committee on the Environment, Public Health and Consumer Policy calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

## Amendment 1

## Recital 13

(13) Service providers should take appropriate measures to safeguard the security of their services, if necessary in conjunction with the provider of the network, and inform subscribers of any special risks of a breach of the security of the network. Such risks may especially occur for electronic communications services over an open network such as the Internet. It is particularly important for subscribers and users of such services to be fully informed by their service provider of the existing security risks which are outside the scope of possible remedies by the service provider. Service providers who offer publicly available electronic communications services over the Internet should inform users and subscribers of measures they can take to protect the security of their communications for instance by using specific types of software or encryption technologies. Security is appraised in the light of Article 17 of Directive 95/46/EC.

(13) Service providers should take appropriate measures to safeguard the security of their services, if necessary in conjunction with the provider of the network, and inform subscribers of any special risks of a breach of the security of the network. Such risks may especially occur for electronic communications services over an open network such as the Internet or ***mobile telephony***. It is particularly important for subscribers and users of such services to be fully informed by their service provider of the existing security risks which are outside the scope of possible remedies by the service provider. ***Service providers shall be obliged to notify subscribers about the type of traffic data being processed and their right to refuse such processing.*** Service providers who offer publicly available electronic communications services over the Internet should inform users and subscribers of measures they can take to protect the security of their communications for instance by using specific types of software or encryption technologies. Security is appraised in the light of Article 17 of Directive 95/46/EC.

*Justification*

*It is deemed indispensable to include a reference to the medium of mobile telephony and to users' rights in the proposal for a directive.*

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<sup>1</sup> OJ C 365, 19.12.2000, p. 223.

## Amendment 2

### Recital 16

(16) The introduction of itemised bills has improved the possibilities for the subscriber to check the accuracy of the fees charged by the service provider but, at the same time, it may jeopardise the privacy of the users of publicly available electronic communications services. Therefore, in order to preserve the privacy of the user, Member States should encourage the development of electronic communication service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available electronic communications services, for example calling cards and facilities for payment by credit card.

(16) The introduction of itemised bills has improved the possibilities for the subscriber to check the accuracy of the fees charged by the service provider but, at the same time, it may jeopardise the privacy of the users of publicly available electronic communications services. Therefore, in order to preserve the privacy of the user, Member States should encourage the development of electronic communication service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available electronic communications services, for example calling cards and facilities for payment by credit card. ***Alternatively, Member States may require the deletion of a certain number of digits from the called numbers mentioned in itemised bills.***

#### *Justification*

*This recital reinserts part of Recital 18 of Directive 97/66/EC on the deletion of digits.*

## Amendment 3

### Article 2a

2a. 'user' means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;

2a. 'user' means any natural ***or legal*** person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;

#### *Justification*

*The definition of 'user' is expanded to include legal persons.*

Amendment 4  
Article 2f (new)

***f) ‘subscriber’ means any natural or legal person who or which is party to a contract with the provider of publicly available telecommunications services for the supply of such services;***

*Justification*

*Although the term ‘subscriber’ is used, it is not defined. This definition has been taken from Article 2(a) of Directive 97/66/EC.*

Amendment 5  
Article 5(2)

2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.

***Deleted***

*Justification*

*This paragraph creates confusion and allows derogations.*

Amendment 6  
Article 6(2)

2. Traffic data which are necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

2. Traffic data which are necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued. ***This time period must be announced to the subscriber and be as short as possible. After that period, the data must be destroyed immediately.***

### *Justification*

*In the interest of consumer privacy. The time period must be the minimum possible time period in order to protect the user.*

#### Amendment 7 Article 6(3)

3. For the purpose of marketing its own electronic communications services or for the provision of value added services to the subscriber, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services, if the subscriber has given his consent.

3. For the purpose of marketing its own electronic communications services or for the provision of value added services to the subscriber, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services, if the subscriber has given his **prior** consent.

### *Justification*

*The article must leave no room for a different interpretation on this point.*

#### Amendment 8 Article 13(1)

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail **and other personally addressed electronic communications** for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

### *Justification*

*With the huge expansion of mobile Internet products, services such as SMS are already being abused by direct marketers. Europe has been the world leader in mobile telephony. To allow direct marketers to abuse the service would be to reduce its attractiveness to European consumers.*

*For the interests of the protection of personal data and the growth of electronic and mobile commerce, there is an overwhelming case in favour of a ban on unsolicited e-mail and other personally addressed messages in the EU.*